

**Ingeback (Malaysia) Sdn. Bhd. v. East West-UMI
Insurance Berhad & 2 Ors.**

[1994] 2 CLJ

Haji Abdul Malek Bin Haji Ahmad J.

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There is just one final matter which I would like to draw the attention of the Judicial Officers of the Subordinate Courts in Sabah. The provisions governing the evidence of a child are s. 118 and s. 133A of the Evidence Act 1950 and these have to be read with the Oaths Ordinance (Cap. 89) of Sabah. This has the effect that when a child is allowed to give evidence not on oath or affirmation, the Court must caution the child "to speak the truth, the whole truth and nothing but the truth". As to the tests to be employed in ascertaining whether a child should give evidence on oath or affirmation or after caution, the case of *Kee Lik Tian v. PP* [1984] 1 MLJ 306, at pp. 308-309, provides valuable guides to which the Judicial Officers should refer to. That case also lays than that it is advisable to put on record as to what went on in the Court with regard to determination of whether a child should be allowed to give evidence.

a INGEBACK (MALAYSIA) SDN. BHD.

v.

**EAST WEST-UMI INSURANCE BERHAD
& 2 ORS.**

b HIGH COURT, KUALA LUMPUR
DATO' HAJI ABDUL MALEK BIN HAJI
AHMAD J.
[GUAMAN CIVIL NO. D5-22-1025-90]
24 FEBRUARY 1994

c ***PRACTICE AND PROCEDURE: Application for leave to intervene - Proper test - Whether proposed intervenors had rights and interests in the matter - Multiplicity of actions in respect of same transaction - Whether to be avoided.***

d The second and third defendants, (the proposed defendants) were developers of the Palm Court condominium project (the project) in Brickfields, Kuala Lumpur. In 1988 they entered into a contract with the plaintiff for the construction of the said project. The defendant, as insurers, executed a performance bond in favour of the plaintiff and guaranteed the plaintiff's performance in the construction of the project.

e The proposed defendants alleged breach of contract against the plaintiff and claimed from the defendant RM2,984,944.30 under the performance bond. The plaintiff later applied for and obtained interlocutory injunction against the defendant, restraining the defendant from paying the proposed defendants under the said performance bond. The result was that on 3 December 1992 the proposed defendants applied to set aside the injunction and a week later, on 11 December 1992, they applied to intervene in the matter.

g The issue was whether under the circumstances the application to intervene ought to be allowed.

Held:

h [1] The proposed defendants clearly had interests and rights in the matter to be intervened. It is also abundantly clear that the involvement of the proposed defendants is part and parcel of the dispute between the plaintiff and the defendant. As the delay in making the application had been satisfactorily explained to the Court and as multiplicity of actions regarding the same transaction ought to be avoided, there is reason enough to allow the proposed defendants to intervene and be made parties to the action.

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[Application allowed].

Cases referred to:

Arab Malaysian Merchant Bank Bhd. v. Jamaludin bin Dato Mohd Jarjis [1991] 1 MLJ 27 (**foli**)
Gula Perak Bhd. v. Varghese Mathai [1988] 3 MLJ 358 (**dist**)
Tengku Jaya bin Raja Hassan v. Mohamed bin Zakaria & Anor. (Talasco Insurance Sdn. Bhd., Intervener) [1987] 2 MLJ 97 (**dist**)
Penang Mining Co. Ltd. v. Choong Sam & Ors. [1969] 2 MLJ 52 (**refd**)

Other Cases listed as being referred to by Counsel:

Tong Swee King v. Pegang Mining Co. Ltd. & Ors. [1967] 2 MLJ 214
The "Mardina Merchant" [1974] 2 Lloyds 424
United Prime Corporation Berhad v. Q-Built Construction (M) Sdn. Bhd. & 3 Ors. [1987] 1 CLJ 501
Dow Banking Construction v. Mahnakh Spinning and Weaving Corporation and Bank Mellat [1983] 2 Lloyds 561

For the plaintiff - Kamilah Kassim; M/s. Shahinuddin & Ranjit

For the defendant - R. Zechariah; M/s. Anad & Associates

For the proposed defendants - C.C. Wong; M/s. Iza Ng Yeoh & Kit

JUDGMENT**Dato' Haji Abdul Malek bin Haji Ahmad J:**

Both the proposed defendants had applied by summons in chambers filed on 3 December 1992 upon a certificate of urgency to set aside the interlocutory injunction granted to the plaintiff against the defendant on 6 July 1990 restraining the defendant from paying RM2,984,944.30 or part thereof to the proposed defendants. On 11 December 1992, also upon a certificate of urgency, they had applied for leave to intervene in the matter. The reverse sequence of the filing of the applications was never explained but when the matters came up for a joint hearing before me, I had quite naturally directed that the second application be heard first.

The proposed defendants, who are developers of the Palm Court condominium project in Brickfields, Kuala Lumpur, had entered into a construction contract with the plaintiff. The proposed defendants allege that the plaintiff had committed a breach thereof and they had accordingly made a demand on the defendant who were the insurers. However, the plaintiff had obtained the injunction on 6 July 1990 against the defendant to prevent them from paying the proposed defendants under the

a performance bond. Learned Counsel for the proposed defendants had explained that they had not applied to intervene then because of the dispute between the parties and because their prime concern was the completion of the project itself. As the project had now been completed, they were therefore taking steps to claim on the performance bond.

b Learned Counsel for the defendant was of the view that the proposed defendants had no legal rights against them as the defendant had issued the performance guarantee, which expired on 31 May 1990, in favour of the plaintiff. She had referred to the agreement made on 14 December 1987 between the defendant and the proposed defendants which was supplemental to the contract between the plaintiff and the proposed defendants on 24 March 1988. On 19 April 1990, the proposed defendants had terminated the plaintiff's services due to their breach and on 23 April 1990, the proposed defendants had made a demand on the defendant on the performance guarantee. Accordingly, the plaintiff had on 6 July 1990 obtained the injunction to stop the defendant paying out on the performance guarantee to the proposed defendants. However, she added, on 10 August 1990, the proposed defendants had entered into a fresh supplementary agreement with the plaintiff whereby the plaintiff was reinstated as contractor on fresh terms but subsequently the plaintiff had also breached the supplementary agreement.

f She was of the view that since the plaintiff had been reinstated as contractor, there was no more breach by the plaintiff as regards the first agreement as the proposed defendants had waived the earlier breach by the reinstatement. The demand on them, in her opinion, had lapsed on 31 May 1990 and the injunction was no longer necessary. She had argued that there was no question to be tried between the proposed defendants and the existing parties, that the issues did not arise out of and relate to the claims in the existing action and it was not just and convenient to add the proposed defendants as parties. She added that the plaintiff's claim was for a declaration that the performance guarantee was void and the proposed defendants had no rights thereto as they had waived the plaintiff's breach. In any case, she said, the performance guarantee had expired and the proposed defendants had delayed in making this application to intervene. She also submitted that the proposed

defendants could separately sue the plaintiff for breach of contract or the defendant on the performance guarantee.

Learned Counsel for the plaintiff had submitted that looking at the recital of the supplementary agreement, both the plaintiff and the proposed defendants had agreed that there was no breach but only a dispute and that in view of the second agreement, the first performance guarantee was not operative any more. As such, she was of the view that the proposed defendants had not really set out the facts as to how they are entitled under the performance guarantee.

Learned Counsel for the proposed defendants had replied that both the agreements were still in existence and the supplementary agreement was only to enable the plaintiff to put themselves together to improve on their work. In reply to learned Counsel for the plaintiff, learned Counsel for the defendant had argued that the second agreement was not supplementary to the first which was no longer in existence as it had already been terminated for breach.

From these facts, it is abundantly clear that the involvement of the proposed defendants is part and parcel of the dispute between the plaintiff and the defendant and despite their delay in making this application, for which they had explained to the satisfaction of the Court, I was of the considered opinion that they should be allowed to intervene and be made parties to the action. Most of the matters raised by learned Counsel for the defendant and, to a lesser extent, learned Counsel for the plaintiff are matters which could be more appropriately dealt with at the hearing of the other pending applications. Learned Counsel for the defendant's suggestion that the proposed defendants file a separate suit against the plaintiff or the defendant had somewhat demolished her otherwise persistent and almost convincing arguments that the proposed defendants should not be allowed to intervene. Needless to say, the unchallenged affidavit of the proposed defendants, which had set out the background facts in perspicuous detail, has to be admitted in its entirety, confirming my finding of their interests and rights in the matter. It is trite law that multiplicity of actions as regards the same transaction should be avoided and this really is a case on point.

- a* The Supreme Court in *Arab Malaysian Merchant Bank Bhd. v Jamaludin bin Dato Mohd. Jarjis* [1991] 1 MLJ 27 had ruled that intervention of this kind is proper where the proposed intervenor's legal rights are affected. The case of *Gula Perak Bhd. v. Varghese Mathai* [1988] 3 MLJ 358 cited by learned Counsel for the defendant needs to be distinguished as the intervenor's dispute there was with the secured creditors who were not parties to the action. Similarly, the facts in *Tengku Jaya bin Raja Hassan v. Mohamed bin Zakaria & Anor. (Talasco Insurance Sdn. Bhd., Intervener)* [1987] 2 MLJ 97, as decided by me, were quite different.

- c* The Privy Council in *Pegang Mining Co. Ltd. v. Choong Sam & Ors.* [1969] 2 MLJ 52 had per curiam stated that

it has sometimes been said that a party may be added if his legal interests will be affected by the judgment in the action but not if his commercial interests only would be affected. While their Lordships agree that the mere fact that a person is likely to be better off financially if a case is decided one way rather than another is not a sufficient ground to entitle him to be added as a party, they do not find the dichotomy between "legal" and "commercial" interests helpful. A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?

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- e*
- f* when agreeing to the Federal Court's decision in that matter in allowing the applicant to intervene.

In the event, I had granted the order in terms of the application made by the proposed defendants with costs in the cause.

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